(3)

No. 811

In the Supreme Court of the United States

OCTOBER TERM, 1942

C. W. SANDLIN,
Petitioner,

VERSUS

C. E. GRAGG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, C. W. Sandlin, prays that a Writ of Certiorari issue to review the decision of the United States Circuit Court of Appeals for the Tenth Circuit rendered January 11, 1943, affirming a judgment of the District Court, filed and entered October 16, 1941, in the Eastern District of Oklahoma. That the judgment of said District Court decreed that the said District Court had jurisdiction of an action brought in the said court, No. 4763, in Equity, by Superior Oil Corporation, hereinafter called Superior, to quiet its title to a leashold interest in and

to a certain described tract in Seminole County, State of Oklahoma, and in which bill the Superior alleged that another certain interest in said leasehold was claimed by the two defendants, C. W. Sandlin and C. E. Gragg, herein respectively petitioner and respondent, and both residents of Oklahoma.

On issues framed by respondent and petitioner the District Court of Eastern District of Oklahoma overruled objection to the jurisdiction of the district court. Petitioner then pleaded two state judgments as estoppel against claim of respondent that he acquired title to the matters in litigation by virtue of a settlement. These estoppels were, 1st, a judgment of revivor of the judgment rendered in the district court of Seminole County, and 2nd, a judgment of affirmance in the Supreme Court of Oklahoma.

JURISDICTION OF THIS COURT

This Court has jurisdiction because the Circuit Court of Appeals, 1st, decided important questions of local law in conflict with applicable decisions, and

2nd, had decided a question involving jurisdiction of a federal court in direct conflict with applicable decisions of this court and has departed from the usual and accepted course of judicial proceeding in seizing a subject matter within the exclusive jurisdiction of state court.

Jurisdiction herein is based on Section 240 (a) of the Judicial Code as amended by 28 U. S. Code, Sec. 347, juris-

diction below being based upon a theory that the parties herein were interpleaded.

It is our contention that no interpleader was filed, but whether this be true or not, the decision of the Circuit Court disregarded the principles enumerated in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and gives this Court jurisdiction. The Circuit Court struck down two judgments of the State Courts of Oklahoma, that had been rendered in accordance with the statute, Constitution and established decisions of such court, being rendered in construction of statutes and the principles of the common law prevailing in Oklahoma, in this: that the error of the Circuit Court is in holding that the state court was without jurisdiction to enter an order of revivor on a judgment duly rendered, thereby adjudicating that the judgment was an existing unsatisfied legal demand; and secondly, in denying that the Supreme Court of the state had jurisdiction to review a case, decision and judgment of the district court of Seminole County.

The Circuit Court specifically and expressly violated the following statement as found in the first paragraph of the syllabus in said *Erie R. Co.* v. *Tompkins*:

> "The phrase 'laws of the several states' in the provision of Sec. 34 of the Federal Judiciary Act of September 24, 1789, Chap. 20, 28 U. S. C. Sec. 725, that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply, cannot constitutionally be construed as excluding in matters of

general jurisprudence the unwritten law of the state as declared by its highest court."

The Circuit Court therefore disregarded the fixed rule of this Court that the decision and judgment of the state court construing and executing the statutes and in interpreting and executing the common law in force within its borders must be accepted and followed. The Circuit Court disregarded two state judgments executing and necessarily interpreting its law by holding that such state court did not have jurisdiction to render such judgments. This was done in the face in the one instance of a direct and positive statute expressly construed by the Supreme Court and in the other in the face of universal rules of the common law which had been specifically applied in Oklahoma.

The first judgment was one of statutory revivor which adjudicated that the judgment had not been satisfied, but was in full force, and the second was a decision of the Supreme Court, that held that Gragg, the respondent, held the legal title to premises involved as a trustee for Pruitt and his assignee, Sandlin, and ordering an accounting. The Circuit Court ignored the rule stated in *Erie Ry. Company* v. *Tompkins,* 304 U. S. 64.

AN ANALYSIS OF ERRORS OF CIRCUIT COURT

The facts are simple. A decree was entered in the district court of Seminole County, Oklahoma, on January 5, 1932, adjudging C. E. Gragg, respondent, a trustee of a leasehold interest for Freelan Pruitt, deceased, and his as-

signee, C. W. Sandlin (R. 244). On March 25, 1933, a judgment in accounting was rendered in same action awarding to Pruitt and against Gragg $20,252.28.

The case was appealed to Supreme Court of Oklahoma and on July 27, 1933, an attempt was made to settle the case both as to the judgment rendered for accounting and also as to declaration that Gragg held title as trustee. The settlement was not disclosed to the state courts.

Pruitt died and the district court on due notice revived the judgment under Sec. 1077, Title 12, Chap. 18 of Oklahoma Ann. St.

REVIVOR

The Circuit Court without referring to the statute, but applying the common law (R. 249) say:

> "If the entry of order of revival of the judgment in the state court, if valid, would have the effect of barring Gragg from asserting the satisfaction and discharge of the judgment."

The invalidity summoned to defeat the "barring" is that an appeal was pending at the time of such revival. Another section provides the revival must be within a year. Thus the statute requires the revival of all unsatisfied judgments within a year, when in no event could the appeal be disposed of within that time. A revival is not a change of a judgment, but a continuance of the same in condition so it could be reviewed.

The Supreme Court had previously held that a judgment could be revived in trial court while an appeal was pending.

Jones v. *Nye*, 56 Okla. 378.

The Circuit Court therefore held *the revival order void for want of jurisdiction in disregard of the Oklahoma decision that the state district court had the power, right and duty to revive the same notwithstanding appeal.*

AFFIRMANCE

The case on appeal was prosecuted by Gragg and defended by Sandlin, and after oral arguments by both petitioner and respondent, it was affirmed, December 22, 1936.

Gragg v. *Pruitt*, 179 Okla. 369.

Petition for rehearing by respondent was filed March 9th, 1937, and was overruled.

The Court affirmed a decision of Seminole district court declaring Gragg a trustee of the leasehold interest involved in suit and ordered an accounting "and that this Court retain jurisdiction of this cause for the purpose of completing said accounting" (R. 75). The mandate was duly issued by Supreme Court (R. 247) and filed in district court March 23rd, 1937. The opinion of Circuit Court say (R. 247):

> "The Supreme Court of Oklahoma affirmed the judgments in No. 15050. Its mandate was received and filed in the district court of Seminole County on

March 23, 1937. On the same day, Gragg filed the release and satisfaction of judgment executed by Pruitt."

The release and satisfaction referred to was a settlement dated July 27, 1933, long prior to the order of revivor and the order of affirmance.

The Circuit Court of Appeals held (R. 250) that the affirmance of the judgment by the Supreme Court did not affect Gragg's rights in the leasehold as Pruitt had effectually conveyed that interest to Gragg and had satisfied and discharged the judgment against Gragg. The Court closed this statement with the following: *"There was nothing for the Court (the Supreme Court) to exercise its power upon."* (Italics added).

The Circuit Court erroneously held that an attempt at settlement made while the state Supreme Court was considering on review the judgment of the state district court deprived the Supreme Court of jurisdiction. This settlement was not called to the Court's attention but after the supposed settlement was made the Supreme Court continued to exercise its statutory and constitutional jurisdiction to review judgments of state district courts at the invitation of respondent and petitioner. The assumption of jurisdiction, its review and affirmance of a judgment of a trial court is conclusive on all courts everywhere that the Supreme Court had such jurisdiction. No court, state or federal, can review its decision so far as its construction of its jurisdiction.

Corpus Juris, Vol. 3, P. 372, Sec. 129, 4 C. J., P. 127, Sec. 45, state the rule as apparently universal:

> "Where an appellate court is a court of last resort it is generally the exclusive judgment of its own jurisdiction."

In the case of *Heller* v. *Fidelity & Casualty Co.*, 88 Ind. App. 77, the Court stated the undoubted rule that where the Supreme Court assumes jurisdiction its determination of the question by its act in assuming such jurisdiction is a judicial act within its power and cannot be questioned by any other court.

Such pretended settlement is the sole basis for appeal to the federal court.

ESTOPPELS

Petitioner claims that the settlement was abandoned by the record proceedings and also expressly by substitute agreements. We will not discuss at this time these substitute agreements, but will emphasize petitioner's allegation pleaded and his proof that the state court directly adjudged that no settlement had been made of the judgment and of the trust. These adjudications were years before Superior instituted its suit and were of record when Gragg filed his release and settlement, so that the state court having the exclusive jurisdiction had declared no settlement or satisfaction of the judgment had been made.

FEDERAL COURT'S JURISDICTION

Another controlling rule is that in an action to declare a trust and enforce an accounting, the court seizes the *res*

which cannot be taken from it by any other court. This is the rule both in the federal and state court.

Black Panther Oil & Gas Co. v. *Swift*, 69 Okla. 33.

Farmers' Loan & T. Co. v. *Lake Street Elev. Ry. Co.*, 177 U. S. 51.

While the property, subject of the litigation, was in *custodia legis* the Circuit Court asserts that the agreement of the parties concealed from the court deprived the court of jurisdiction of the *res* seized. If it were so when the parties returned to the court and litigated the questions involved in the appellate proceeding the jurisdiction would be again lodged in the court. In every event when the parties induced the decision on the merits, they would be bound by decision rendered. This particularly is true when the Supreme Court assuming jurisdiction is in effect a decision conclusive on all other courts as to such jurisdiction. The Circuit Court attack on the jurisdiction of the state court was collateral and lack of jurisdiction must appear on the face of the record. This lack could not appear from document concealed by the parties.

The Circuit Court also erred in holding that the District Court of the Eastern District of Oklahoma acquired jurisdiction of the subject matter in controversy between petitioner and respondent when the state district court of Seminole County had seized the *res* involved in a suit pending before it and had declared and was adminis-

tering a trust of the property. This proposition will be considered after the estoppels interposed.

Toucey v. *New York Life Ins. Co.*, 311 U. S. 643.

THE QUESTIONS PRESENTED

The questions presented therefore are: 1st, That the Circuit Court erred in denying full force and effect to the judgment of the district court of Seminole County, Oklahoma, reviving a judgment under the statutes of Oklahoma which provide that same could only be revived when the judgment was unsatisfied.

2nd. That the appellate court erred in refusing to give proper effect to the judgment of the Supreme Court of the State of Oklahoma affirming a judgment rendered by the district court of Seminole County declaring the property in controversy a trust and ordering the further administration of the trust.

3rd. That the Circuit Court of Appeals erred in attempting to take from the state courts of Oklahoma jurisdiction over the *res* which was then in *custodia legis* by virtue of a judgment declaring the property held by respondent in trust for the use of petitioner as assignee of Pruitt.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1st. The decision below is in direct conflict with the decision of this Court in *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64.

2nd. The decision of the Circuit Court is in direct conflict with the decisions, statutes and common law of Oklahoma authorizing a revivor of judgment upon the death of the judgment creditor when such judgment is unsatisfied.

3rd. The decision of the Circuit Court is in direct conflict with the decisions and judgment of the Supreme Court of the State and the common law pronounced by the said Supreme Court of Oklahoma, and in force in said State of Oklahoma by which the Supreme Court determines its own jurisdiction. Such determination results from the assumption of jurisdiction by the Court and cannot be collaterally attacked by any other court, state or federal.

4th. That the Circuit Court erred in holding that the Federal District Court could acquire any jurisdiction of the subject matter.

5th. That the questions presented herein are of general public importance and the decision of the Circuit Court constitutes a plain departure from the established rule allowed in *Erie R. Co.* v. *Tompkins, supra.*

6th. That the decision of the Circuit Court disregarded the established relationship between state and federal government by which the courts of either cannot interfere with the administration of property in *custodia legis.*

Toucey v. *New York Life Ins. Co.*, 314 U. S. 118, 134.

Kline v. *Burke Cons. Co.*, 260 U. S. 226, 235.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the 10th Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record below, and that the decision of said Circuit Court of Appeals be reversed and the said Circuit Court of Appeals be ordered to dismiss the said proceeding or that same be remanded to the district court with instructions to recognize the estoppels pleaded by petitioner in the court below, and that petitioner have such other and further relief as may be just.

C. W. SANDLIN,
By B. B. BLAKENEY,
Counsel.

CERTIFICATE

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

Dated at Oklahoma City, Oklahoma, the —— day of March, 1943.

_____,
Counsel.

1519 Petroleum Bldg.,
Oklahoma City, Oklahoma.

ARGUMENT

The petitioner claimed that the Circuit Court of Appeals disregarded and refused to follow the rule stated in *Erie Ry. Co.* v. *Tompkins, supra.* This Court in that case expressly said that there was no Federal common law, and that the Federal court should apply the constitutional and statutory laws as well as the substantial common law applicable to the state where the controversy arose. Under this rule two distinct errors were committed in this case in disregarding two state judgments.

These judgments were:

1. A judgment of Revival (R. 147).

2. The affirmance (R. 247) of the judgment, supposed satisfied.

In the opinion, page 249, the Circuit Court says:

> "Counsel for Sandlin asserts that the judgment of revivor entered by the district court on April 9, 1935, estops Gragg from asserting the satisfaction and discharge of the judgment. Under the order of appointment, Roff, as special administrator, was without authority to seek revival of the judgment. The order of appointment expressly limited his power to revival of the action and the appeals. If the entry of the order of revival of the judgment in the district court, if valid, would have had the effect of barring Gragg from asserting the satisfaction and discharge of the judgment."

We are presenting them in their chronological order.

I.
REVIVOR

The first contention is that a judgment of revivor had been entered in the district court of Seminole County, Oklanoma, reviving a certain judgment therein in which Freelan Pruitt had recovered a judgment against C. E. Gragg for the sum of $20,252.28, and declaring that the interest that Gragg held in a certain leasehold was impressed with a trust in favor of the said Pruitt. The judgment declaring the trust was rendered on the 5th day of January, 1932 (R. 72), and the judgment for an accounting on March 27th, 1933 (R. 76). The judgment provided (R. 75) that:

> "and that this court retain jurisdiction of this cause for the purpose of completing said accounting and to render such further and final judgment herein as the facts, upon such accounting, may show."

A purported settlement was made by Gragg and Pruitt, which is fully described in the opinion of the Court (R. 243). The Circuit Court recited that on the 27th day of July, 1933, Gragg and Pruitt executed a stipulation; by which full and complete payment and satisfaction had been made by Gragg to Pruitt of all claims of Pruitt against Gragg, and requested that the Supreme Court enter a judgment in accordance with such settlement. This settlement and this request for the entering of judgment in the Supreme Court was not called to the attention of the court. The evidence attempted to explain this situation, but as the court has made the findings against us we will

not take the time to discuss a situation that seems to have been obvious.

It is admitted, however, that the parties did not rely upon this purported settlement. At the time that this settlement was made the case was pending on appeal in the Supreme Court of the state from both of the judgments. Gragg continued the prosecution of his appeal and Pruitt continued to resist the reversal of the case. After this settlement and while the case was still pending on appeal Pruitt, on May 15, 1934, died, and Hugh Roff was appointed as special administrator. The order of revivor found at page 148 of Record, provides:

> "And the court being further satisfied that Freelan Pruitt, the original plaintiff herein, departed this life on or about the 19th day of May, 1934, and that the cause of action stated in the petition and the judgment thereon rendered is one which survives to the estate of said Freelan Pruitt, deceased, and that Hugh Roff, is the duly and legally appointed, qualified and acting special administrator of said estate with power only to revive said action and judgment therein rendered, and that said action and judgment ought to be revived in the name of Hugh Roff as special administrator of said estate.
>
> "It is therefore ordered and adjudged that said action and the judgment therein rendered by and the same is hereby revived in the name of Hugh Roff, as special administrator of the estate of Freelan Pruitt, deceased, and that all further proceedings therein be in the name of such special administrator."

This order of revivor was regularly entered after notice to Gragg. Afterward the case came on for disposition

in the Supreme Court and the same was affirmed. Petition for rehearing was filed. The matter was re-briefed and re-argued by Gragg, but the petition for rehearing was denied From that record the petitioner contends that there were two direct absolute estoppels by judgment barring respondent from claiming that any settlement had been made of the controversy.

The first contention is that under the provisions of Section 1077, Title 12, Chapter 18, Okla. St. it is provided:

> "If either or both parties die after judgment, and before satisfaction thereof, their representatives real or personal, or both, as the case may require, may be made parties to the same, in the same manner as prescribed for reviving actions before judgment; and such judgment may be rendered, and execution awarded, as might or ought to be given or awarded against the representatives, real or personal, or both."

1st. The Circuit Court of Appeals admits in its opinion (R. 249), that "If the entry of the order of revival of the judgment in the district court, if valid, would have had the effect of barring Gragg from asserting the satisfaction and discharge of the judgment." The Court then adds "the state district court was without jurisdiction to enter such order." The reason why the state district court was without jurisdiction was because an appeal to the Supreme Court suspended the trial court's jurisdiction and it was without authority to make any order materially affecting the rights of the parties. Cases are cited that do not have any application to the question. It is a universal rule of law that

an appeal from a judgment suspends the power of the trial court to alter, amend or correct the judgment.

An appeal, however, does not suspend any other power of the trial court. The most frequent instances are where a receiver has been appointed and after appeal a vacancy results in receivership the court may appoint a new party to act as such receiver for the purpose of keeping the matter in shape so it could be affirmed or reversed by the Supreme Court.

Foote v. *Parsons Non-Skid Co.*, 196 Fed. 951, 118 C. C. A. 105;

In re Heaton, 142 Calif. 716;

Krough v. *McNutt*, 7 Minn. 29;

3 Corpus Juris, 1258-1260.

That same rule has been uniformly applied to the statutes on revivor.

The above code provision regarding revivor after judgment, was adopted by Oklahoma from Kansas in 1893. At the time of its adoption it had been construed by the Supreme Court of Kansas in the case of *Central Branch, etc. R. R. Co.* v. *Andrews*, 34 Kan. 563 (1886), where the Court said:

> "The district court had authority not only to revive the judgment, but to take any steps necessary to the execution of the same."

In *Jones* v. *Nye*, 56 Okla. 378, the Supreme Court had before it the identical question. In that case a revivor had not been made during the pendency of the appeal, and the

time had expired in which the same could be made. The judgment debtor contended that the judgment was dormant. The judgment creditor insisted that during the pendency of an appeal that he could not revive, and that therefore the judgment was not dormant. The Court said:

> "This contention, however, cannot be sustained for the reason that the filing of a supersedeas bond and institution of a proceeding in error in the Supreme Court did not operate further than to stay proceedings on the judgment. The district court had the power to revive the judgment pending the appeal in the manner prescribed by the statute." Citing *Central Branch, etc. R. R. Co.* v. *Andrews*, 34 Kan. 563.

In the case at bar, no bond was given to stay the judgment, but this does not affect the rule.

The Circuit Court of Appeals (Bottom of Record, page 249) further stated regarding this order of revivor:

> "The record does not contain the order of revivor in the Supreme Court, but in the motion made by Roff in the Supreme Court was to revive the appeals, not the judgments . . . We must assume, in the absence of a contrary showing, that the Supreme Court's order was in accordance with the motion."

The revivor after judgment which we pleaded as a bar is in effect a writ of *scire facias*, entirely different from a motion to revive a pending action. The appeal was a pending proceeding, and a revivor was under Section 1068, Title 12, Chapter 18, Okla. St., which merely substitutes a competent party to continue the prosecution or defense of the case. A revivor after judgment is a different thing ,from the revival of a pending action, as a judgment

is rendered in such proceeding which is *res adjudicata* of every matter that was or could have been pleaded as a defense. The distinction between the two is that the revivor of a pending action is merely an interlocutory motion. We do not claim that any revivor in the Supreme Court was a bar. Therefore, the court inadvertently referred to such revivor.

A revivor, however, after judgment is a distinct proceeding, though ancillary to the original matter. The parties must make up issues. If it is claimed the judgment is paid, an answer must state the facts. A trial may be by jury and from the judgment rendered therein an appeal can be prosecuted. The cases which we cite below repeatedly emphasize these principles and state the clear distinction between a mere substitution of a party in a pending action and a revivor of a judgment upon the death of one of the parties. The cases are so numerous supporting this rule that we cannot do more than call attention to some of the leading cases.

This provision copied from Kansas, thence from Ohio had its earliest construction in *Nestlerode* v. *Foster*, O. C. C. of App. 4 O. C. C., Dec. 385:

> "In a proceeding in revivor it is not competent to relitigate the question involved in the original suit or to collaterally impeach the record and judgment. In such proceedings the defendant 'cannot go behind the returns' or interpose any defense which existed anterior to the judgment; he is limited and confined to defenses accruing subsequently to the judgment; such as payment or its equivalent, or something that has been

done, under the original judgment, which exonerates him from liability—something that goes directly to the judgment and shows its satisfaction or ending."

The Federal Court gives it the same construction:

Wonderly v. *LaFayette County*, 74 Fed. 702.

We cited in our brief in Circuit Court the following applicable cases:

Witherspoon v. *Twitty*, 43 S. C. 348, 21 S. E. 256;

Ward v. *Sturdivant*, 96 Ark. 434, 132 S. W. 204;

Babb v. *Sullivan*, 43 S. C. 440, 21 S. E. 277;

Hickox v. *McKinley*, 311 Mo. 234, 278 S. W. 671;

Broadwater v. *Foxworthy*, 57 Neb. 406, 77 N. W. 1103;

Johnson v. *Carpenter*, 77 Neb. 49, 108 N. W. 161;

Manley v. *Park*, 68 Kan. 400, 75 Pac. 557;

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First Nat'l. Bank v. *Laubach*, 333 Pa. 344, 5 Atl. (2d) 139.

In *LaFitte* v. *Salisbury*, 43 Colo. 248;

"It is true she alleges in her complaint that no assignment of the judgment was ever made by him to the defendant Salisbury, but the facts upon which she relied in support of this contention will not permit her to raise that question. The judgment of the district court when the original judgment was revived settled that issue as between the plaintiff and defendant, Salisbury in the absence of such averments of fraud as would permit her to now litigate it."

We call attention to the following interesting and pertinent case on revival:

In *T. & A. Kuykendall*, 206 Fed. 482, Judge ROBERT E. LEWIS, as district judge, considering a revival proceeding, quoted and approved the following from *LaFayette Co.* v. *Wonderly*, 92 Fed. 313 (C. C. A.):

> "Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment had been paid, satisfied or released."

There seems to be no reported case holding to the contrary of these rules, and the Circuit Court acknowledged the force of these principles when it attempted to assail the jurisdiction of the court. We will enlarge a little further on the jurisdiction of the court in discussion of the other branches of our argument.

II

AFFIRMANCE

The Circuit Court erred in holding that an order of affirmance in the case was not *res adjudicata* barring Gragg from contending that a settlement had been made. The Court said (R. 250):

> "Neither did the affirmance of the judgment by the Supreme Court affect Gragg's rights in the leasehold. Pruitt had effectually conveyed that interest to Gragg and had satisfied and discharged the judgment against Gragg. The payment of the consideration for the settlement and the execution and delivery by Pruitt to Gragg of the satisfaction of the judgment was the last act and the end of the proceedings as against Gragg and effectually extinguished the judgment. The judg-

ment, insofar as it affected Gragg, having been paid, satisfied, discharged, and extinguished, it could not thereafter be affirmed by the Supreme Court of Oklahoma. There was nothing for the Court to exercise its power upon."

The court obviously again recognizes that the judgment of affirmance would bar such settlement if the Supreme Court had jurisdiction of the controversy. The theory of the Circuit Court was that the attempted settlement had withdrawn the jurisdiction from the Supreme Court, though such settlement was attempted in a case where the court had seized custody of the property in controversy, declared a trust and by its judgment was administering such trust. It is also contended that this jurisdiction of the Supreme Court was divested without the Supreme Court knowing that a settlement had been made. In addition, the parties had appeared for more than three years before the court, urging its decision of the matters involved in the appeal, and thereby invoking the jurisdiction of the Supreme Court. It would seem that if the parties withdrew by their stipulation the case out of the court that they could by their further acts of prosecution and defense of the case in the Supreme Court restore the jurisdiction to that court. We contend, however, that of course jurisdiction could not have been withdrawn from the Supreme Court in this manner, and will present the question under a later assignment.

It is our present contention that the Supreme Court adjudged the rights of the parties long after the purported settlement. The court decided that Gragg held the title as a

trustee, and ordered an accounting and affirmed a previous accounting that had been taken. Whether the Supreme Court had jurisdiction of the matter is a question entirely within the scope of its jurisdiction. The Supreme Court has such jurisdiction as the Constitution and the statutes of Oklahoma gave it. Its construction of the local laws is conclusive upon the federal court.

The rule seems to be universal that the affirmance of the judgment is equivalent to a reissuance of the judgment, and bars all defenses that might have been interposed arising subsequent to the entry of the judgment.

The case of *Heroux* v. *A., T. & S. F. Ry. Co.*, 35 Cal. App. 128, is in point. A settlement had been made, after which a petition for rehearing had been filed by the appellant. This petition was denied and the case remanded. After the remand an attempt was made to obtain relief against the judgment because of the previous settlement. The court held that presenting the petition for rehearing was a waiver of the right for any relief against the judgment. The Court stated the proposition in the following language:

> "Will this court issue an order recalling its remittitur when the moving party fully cognizant thereof from the time of the filing of the opinion of this court, has failed to call the alleged fraud and imposition upon which the motion is based to our attention by way of a petition for rehearing?"

The Court answered the question in the following language:

> "The law is established that, where an aggrieved party is cognizant of fraud or mistake upon which an appellate court has based its decision, unless such party acts promptly, and at the first opportunity to call the court's attention thereto an order will not be made recalling the remittitur after the same has been issued."

The rule that an affirmance estops defenses prior to its rendition is enforced in the federal court. In the case of *Orlando* v. *Murphy* (5th C. C. A.), 94 Fed. (2d) 429, the Court said:

> "Where the merits of a case have been once decided on appeal, the trial court has no authority, without express leave of the appellate court, to grant a new trial and rehearing, or a review, or to permit new defenses, on the merits to be introduced by amendment. Thus, if a case is affirmed on appeal, it is *res adjudicata*, and no power exists after the term to alter the decision."

In the case of *Commissioner of Internal Revenue* v. *Adoph Hirsch & Co.*, 37 Fed. (2d) 98, the identical question is presented. It appears from the record in that case that pending the appeal to the Circuit Court the Commissioner of Internal Revenue and the taxpayer had stipulated in settlement of the case for the payment of a part of the tax sought to be collected. The case, however, came on for hearing in the Circuit Court without the stipulation being called to the attention of the court. In 30 Fed. (2d) 645, the court held the tax invalid. Afterward (37 Fed. (2d) 98) on application to modify the mandate so as to give effect to the settlement the Court said:

"If this settlement had been brought to our attention before the case was decided, we should have dismissed the appeal as moot. *Dakota County* v. *Glidden*, 113 U. S. 222, 28 L. ed. 981."

It was further contended that relief could be had by the old writ of *coram nobis*, and cited the cases from the Supreme Court supporting that writ. The Court then said:

"Assuming without decision that an appellate court can entertain such a writ (a question not free from doubt), and assuming further that the error in our judgment, due to our ignorance of the settlement, is the kind of error which a writ of error *coram nobis* could have been used to correct (a matter also not free from doubt), it is clear that the motion should not be granted, because of the petitioner's failure to bring the facts more promptly to our attention. The writ would not lie if the party seeking the remedy had been negligent in not presenting the facts at the former trial. See *Bronson* v. *Schulten*, 10 U. S. 410, 417, 26 L. ed. 797; *Dobbs* v. *State*, 63 Kan. 321; *Corby* v. *Buddendorf*, 98 Miss. 98, 54 So. 84; *Jeude* v. *Sims*, 258 Mo. 26, 166 S. W. 1048; *Brandon* v. *Diggs*, 1 Heisk. (48 Tenn.) 472. Even during the term a judgment will not be reopened, if the facts relied on were known or could have been learned by reasonable diligence, in time to present before the judgment was entered. There is no excuse suggested here for not producing this agreement in season."

In *Gordon* v. *Hillman*, 98 Wash. 100, 173 Pac. 22, 25, the court considered a case where a party died pending the appeal. It was known to both parties that a necessary plaintiff in error had died and an oral suggestion had been made of the death to the court. No attempt was made to revive the action. The deceased had left surviving two minor

children. After the case had been remanded an application was made to withdraw the remittitur called by our statute a mandate and for a new decision in the case so as to bind the minors. The court denied the relief upon the ground that the parties had known that a party was deceased, but had not called the court's attention to the fact in the proper and regular manner. It was then shown by the petitioners that the deceased party had made a deed and deposited it with the registry of the court at the institution of the suit, and the petitioners asked that the deed be ordered delivered. The court denied this relief also, stating that such action was not in accordance with the order that had been entered on affirmance, and the question had not been presented as a part of the original appeal. The parties, therefore, could not, after judgment, urge such defense.

Many other cases might be cited in support of this proposition. It seems to be the application of a simple rule that is enforced daily in every trial court. If a defendant has a known defense which he has failed to present to the Court, a judgment will not be vacated to permit introduction of the defense. The judgment will not be vacated even at the term, and no action can ever be maintained in any court to get relief against a judgment that has resulted from debtor's negligence. The trial court held that the settlement not being in record on appeal that it would not be affected by the affirmance.

The trial court acted upon the theory that the settle-

ment was not in the appeal record and could not have been considered on appeal.

There is a great array of cases where appeals have been disposed of by introducing evidence of settlement or other acts which are inconsistent with the existence of the judgment. Such facts must be brought into the case by evidence outside the trial records.

Cases where appellant recognized the judgment as valid or is claiming under it:

Tinker v. *McLaughlin-Farrar Co.*, 32 Okla. 778, 119 Pac. 238;

Westgate Oil Co. v. *Refiners Production Co.*, 172 Okla. 260, 44 Pac. (2d) 993;

Anderson-Prichard Refining Corp. v. *Board of County Commissioners*, 186 Okla. 78, 97 Pac. (2d) 5;

Whittington v. *City of Ardmore*, 181 Okla. 266, 73 Pac. (2d) 413;

Beveridge v. *Fairfax Oil Corp.*, 178 Okla. 379, 62 Pac. (2d) 1171.

Where satisfaction is filed in trial court after appeal, proceedings in the Supreme Court will be dismissed.

Doyle v. *Clapp*, 88 Okla. 88, 209 Pac. 324.

Bateman v. *Riner*, 170 Okla. 13, 38 Pac. (2d) 581.

Where appellant has sold his interest in subject-matter.

Sanders v. *Tulsa*, 87 Okla. 269, 210 Pac. 724.

In all these cases and numerous others proof of the facts was brought into the Supreme Court by affidavit or other evidence. The court recognized that its jurisdiction or lack of jurisdiction could be made to appear by proof outside the trial record. Matters arising subsequent to the appeal which disposes of the case can only be presented by evidence offered directly to the Appellate Court.

The rule is that for *review* only matters in the record will be considered, but to *prevent review* or to obtain summary disposition, other matters may be brought in for consideration, and if the parties have within their knowledge facts which preclude review, but fail to present them to the court they will be barred by the decision and judgment rendered.

The claim that Supreme Court lost jurisdiction by the settlement is erroneous.

The Supreme Court is the exclusive judge of its own jurisdiction:

Corpus Juris, Vol. 3, P. 372, Sec. 129, 4 C. J., P. 127, Sec. 45.

In the case of *Heller* v. *Fidelity & Casualty Co.*, 88 Ind. App. 77, the court holds that where the Supreme Court assumes jurisdiction its determination of the question by its act in assuming such jurisdiction is a judicial act within its power and cannot be questioned by any other court.

III
JURISDICTION OF THE *RES*

The third ground justifying this Court in reviewing the decision of the Circuit Court is that the Circuit Court disregarded the decision of this Court in respecting the jurisdiction of the State Court.

The state and federal rule is in accord in the holding that a suit to declare and administer a trust is a seizure by the court of the trust property. The court first acquiring the *res* has exclusive jurisdiction.

In *Toucey* v. *New York Life Ins. Co.*, 311 U. S. 643, it is said:

> "And where a state court first acquires control of the *res* the federal courts are disabled from exercising over it, by injunction or otherwise." Citing *Palmer* v. *Texas*, 212 U. S. 118.

In *Hill* v. *Martin*, 296 U. S. 393:

> "That term (proceedings) is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of *res adjudicata*. It applies to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

The state court follows the federal rule in:

Black Panther Oil & Gas Co. v. *Swift*, 69 Okla. 33, 170 Pac. 238, in the following language:

> "The possession of the *res* vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property had been actually seized under judicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, to administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to federal and state courts."

The opinion of the Circuit Court breaks down the barriers separating state and federal jurisdiction. The balance between the two sovereignties has been scrupulously guarded since the organization of the federal government. This principle is the crux of this case. A brief summary of facts will fully explain the issue.

Superior commenced an action against Pruitt and others to quiet its title to a 3/8 interest in a certain lease. It made Gragg and Sandlin parties but did not allege that they asserted a claim adversely to the interest which the Superior owned, but allege that they were litigating another interest. In brief, two of Superior's co-owners were litigating in a state court a co-interest. These co-owners

being residents of Oklahoma could not litigate their claim in the federal court.

The Superior as an inter-meddler in the controversy of its co-owners, did not give the federal court jurisdiction of its co-owners' controversy.

Again, if Superior could transfer the action between other parties in which it was a mere bystander into a court of its choosing, it could not do so when the original court had seized the *res* and was administering the property as a trust.

The Bill, (R. 6) was filed in the Eastern District of Oklahoma on the 12th day of July, 1937, and the Amended Bill on the 17th day of September, 1937 (R. 20). This was after judgment of revival in the state district court and judgment of affirmance in the Supreme Court had been duly rendered. The excuse for the federal suit is that the Bill and Amended Bill was in nature of an interpleader.

This Bill and the Amended Bill contained no essentials of an interpleader. They allege that it was brought to quiet title of Superior to an interest which it claimed (Sec. 21, para. 3). The requisites of an interpleader is stated by this Court in the recent case of *Florida* v. *Texas*, 306 U. S. 398 as follows:

> "The peculiarity of the strict bill of interpleader was that the plaintiff asserted no interest in the debt or fund, the amount of which he placed at the disposal of the court and asked that the rival claimants be required to settle in the equity suit the ownership of the claim among themselves. But as the sole ground for

equitable relief is the danger of injury because of the risk of multiple suits when the liability is single."

Under this rule the amended bill presented no elements of an interpleader. As we have shown, the state court had seized the property in a suit to declare and enforce a trust, and it could not be withdrawn by any other court.

No claim was made that Superior was subjected to any liability of any kind by the suit between Sandlin and Gragg. The Superior did not make any tender of the subject of controversy into court. The state suit was to administer a trust and Superior had no interest therein.

Again: No federal suit could withdraw the *res* from the state court where it has been actually or constructively seized. This seems admitted by the later argument of the Circuit Court in referring with great detail to the attempted settlement and following with the concluding statement, "hence, the proceeding in the federal court did not interfere with the state court's jurisdiction over the property involved." It was further stated with respect to the interest here involved, that "the action in the state court had come to an end by the satisfaction and discharge of its judgment." In short, it is stated when judgment creditor and debtor stipulate a settlement the court loses its control over property which it is administering as a trust.

Gragg was a trustee of Pruitt's property and the court had seized the property to administer the trust. Any court administering a trust may always inquire into the attempted settlement by a trustee with his *cestui* trust. The parties had stipulated that the Supreme Court should be requested to complete the settlement by making further order.

If the parties by private agreement could withdraw trust from the court, they could likewise replace the property in the court. Gragg continued to prosecute his appeal, briefed and argued his petition in error, filed three petitions for rehearing, and obtained a decision from the court. The fact that the decision was adverse did not impair the court's jurisdiction. Sheridan resisted, argued and re-argued the appeal. The parties thereby replaced the *res* in the court for its adjudication and management.

Maupin v. *Franklin Co.*, 67 Mo. 327;

Atlas Supply Co. v. *Roberts*, 180 Okla. 190;

State v. *District Court Tulsa County*, 82 Okla. 54.

This case is stronger, the court without knowledge of the attempted settlement affirmed the case.

The failure to present this settlement of the trustee with his beneficiary to the Supreme Court is explained by casual consideration of facts admitted. Twenty Thousand Dollars had been received prior to accounting judgment, Ten Thousand more was tendered in court, and Eighty-Eight Hundred Dollars withdrawn after affirmance. Besides the leasehold had a considerable value. This leasehold and Forty Thousand Dollars of oil produced was being taken by this trustee from his ward just of age, for a consideration of $6,500.00, one half of which was going to his attorney. The analysis of the statement so shocking to a conception of fairness furnishes the reason for concealment from the Supreme Court.

Whatever excuse that may be offered, the legal questions urged was primarily interpretation of state laws and

recognized state jurisdiction and should have been remitted to the state court for disposition.

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496;

Gilchrist v. *Brundage*, 276 U. S. 36;

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478.

This Court has recently said that it is a wise and permissible policy for the federal chancellor to stay hand in absence of an authoritative determination by state tribunals.

Chicago v. *Fieldcrest Davies*, 316 U. S. 168;

We therefore respectfully submit that the federal court acquired no jurisdiction of the controversy between Gragg and Sandlin. That a settlement would not withdraw property in *custodia legis* from the court, when the court continued its administering of the trust with no knowledge of the attempted settlement and particularly that the state court twice adjudged no settlement was made. The jurisdiction of state court is a domestic question and the state statute and its court's decisions are conclusive on the federal court.

The Circuit Court having decided important question of local laws in conflict with applicable local decision and has decided a federal question in conflict with the applicable decisions of this court and has departed from the ac-

cepted and usual course of judicial proceedings, this case should be reversed and such error corrected.

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